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The Continental Bank and Trust Company, Administrator, D/B/N With Will Annexed of the Estate of Walter D. Thomas v. Clisbee Kimball, Administrator of the Estate of Fern K. Thomas; Zions Savings & Loan Association; American Savings & Loan Association; Utah Savings & Loan Association; Deseret Federal Savings & Loan Association; Prudential Federal Savings & Loan Association; and State Savings & Loan Association : Petition of Plaintiff and Appellant For Rehearing Together With Brief In Support of Petition

Utah Supreme Court

Arthur H. Nielsen; Attorney for RespondentsDale E. Anderson; Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

THE CONTINENTAL BANK AND TRUST COMPANY, Administrator, d/b/n With Will Annexed, of the Estate of Walter D. Thomas,
Plaintiff and Appellant,

vs.

CLISBEE KIMBALL, Administrator of the Estate of Fern K. Thomas; ZIONS SAVINGS & LOAN ASSOCIATION; AMERICAN SAVINGS & LOAN ASSOCIATION; UTAH SAVINGS & LOAN ASSOCIATION; DESERET FEDERAL SAVINGS & LOAN ASSOCIATION; PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION; and STATE SAVINGS & LOAN ASSOCIATION,
Defendants and Respondents.

Case No. 11125

PETITION OF PLAINTIFF AND APPELLANT FOR REHEARING TOGETHER WITH BRIEF IN SUPPORT OF PETITION

Appeal from the District Court of Salt Lake County, State of Utah
Marcellus K. Snow, District Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE CONTINENTAL BANK AND TRUST COMPANY, Administrator, d/b/n With Will Annexed, of the Estate of Walter D. Thomas,

Plaintiff and Appellant,

vs.

CLISBEE KIMBALL, Administrator of the Estate of Fern K. Thomas; ZIONS SAVINGS & LOAN ASSOCIATION; AMERICAN SAVINGS & LOAN ASSOCIATION; UTAH SAVINGS & LOAN ASSOCIATION; DESERET FEDERAL SAVINGS & LOAN ASSOCIATION; PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION; and STATE SAVINGS & LOAN ASSOCIATION,

Defendants and Respondents.

Case No. 11125

PETITION OF PLAINTIFF AND APPELLANT FOR REHEARING TOGETHER WITH BRIEF IN SUPPORT OF PETITION

Plaintiff and Appellant, pursuant to Rule 76(e) of the Utah Rules of Civil Procedure, hereby petitions this Court for a rehearing in the above entitled matter.

Plaintiff and Appellant believes that this Court erred:

1. In deciding an issue which was not before the Court on appeal; and

2. In deciding that Plaintiff and Appellant is not trying to reform the contract of joint tenancy.

BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

This is an action to recover and bring into the estate of Walter D. Thomas certain bank accounts in various saving and loan associations.

DISPOSITION IN THE LOWER COURT

Plaintiff's action was dismissed without a trial.

STATEMENT OF FACTS

A statement of facts is contained in pages 2 and 3 of "Brief of Appellant" previously filed in this Court and is not repeated here.

ARGUMENT

POINT I

THE ONLY ISSUE BEFORE THIS COURT IS WHETHER SECTION 7-13-39, UTAH CODE ANNO. 1953 (AS AMENDED) PROHIBITS PLAINTIFF FROM INTRO-

DUCING EVIDENCE TO ALTER THE APPARENT JOINT TENANCY CREATED BY SAVINGS ACCOUNT CARDS.

In the "Judgment of Dismissal" entered in this case the trial court said:

> ". . . The sole issue to be resolved is an issue of law as to whether the provisions of Section 7-13-39, Utah Code Annotated 1953, as amended, are applicable to the instant matter."

The Defendants and Respondents agree in their statement of the issues that this is the only issue before this Court (Brief of Respondent, page 3):

> "The sole issue to be determined on appeal is whether Appellant is precluded from introducing evidence to alter the contractual relationship otherwise appearing in connection with the joint accounts of decedent and his wife in the various savings and loan institutions."

This Court has decided the only issue before it in favor of Plaintiff and Appellant and the case should have been remanded for further proceedings in the trial court.

However, this Court went beyond the issues on appeal and decided that Plaintiff and Appellant is not trying to reform the joint tenancy contract created by signing savings deposit cards. There is nothing in the record on appeal, in the Briefs filed in this matter, or in the oral arguments made to this Court which supports such a conclusion. Admittedly Plaintiff and

Appellant is not attempting to prove that the contract is not enforceable because of fraud, mistake, incapacity, or other infirmity. This does not mean that Plaintiff and Appellant is not attempting to reform the contract to give effect to the actual agreement of the parties.

This Court has said many times that it does not consider issues raised for the first time on appeal. See, *e.g., Huber v. Deep Creek Irrigation Co.,* 6 Utah 2d 15, 305 P.2d 478 (1956); *Radley v. Smith,* 6 Utah 2d 314, 313 P.2d 465 (1957); *Chumney v. Stott,* 14 Utah 2d 202, 381 P.2d 84 (1963). In this case, the Court has even gone beyond the rule against considering issues raised for the first time on appeal and has decided an issue of fact which was not even raised by either party on appeal.

Because the issue of whether Plaintiff and Appellant is trying to reform the contract was not before this Court and the Plaintiff and Appellant has not even had its day in court on this question of fact, this case should be remanded for further proceedings at the trial level.

POINT II

PLAINTIFF AND APPELLANT IS ATTEMPTING TO SHOW THAT THE JOINT TENANCY BANK ACCOUNTS WERE CREATED FOR CONVENIENCE IN MAKING WITHDRAWALS AND THAT THE PAR-

TIES AGREED THAT THERE WAS NO TRANSFER OF OWNERSHIP BY SIGNING THE SAID ACCOUNT CARDS.

Although Plaintiff and Appellant believes that the issue of whether the parties agreed that the signing of joint account cards was for convenience in making withdrawals and would not transfer ownership from one to the other, Plaintiff and Appellant is forced to discuss the issue because this Court has ruled adversely to Plaintiff and Appellant's position on this question.

Paragraphs 18 through 21 of the "Complaint and Demand for Jury Trial" filed in this case state as follows:

> "18. Walter D. Thomas did not intend to give Fern K. Thomas any ownership rights in the savings accounts mentioned in paragraphs 1 through 14, *supra,* but established joint accounts for convenience of making withdrawals. Walter D. Thomas never told Fern K. Thomas nor any savings and loan official that he intended to make a gift of ownership in any savings account mentioned in paragraphs 1 through 14, *supra,* and Walter D. Thomas never delivered the savings account pass books to Fern K. Thomas and there was therefore no completed gift of any ownership interest in the said savings accounts.
>
> "19. Walter D. Thomas never gave Fern K. Thomas the right to remove any amounts from the savings accounts mentioned in paragraphs 1 through 14, *supra,* during the lifetime of Walter D. Thomas and he did not place such savings at the disposal of Fern K. Thomas during his life-

time, and did not intend to place said savings at the disposal of the said Fern K. Thomas during his lifetime.

"20. Walter D. Thomas did believe that he could dispose of the savings accounts mentioned in paragraphs 1 through 14, *supra,* by his will.

"21. Walter D. Thomas died September 27, 1965, and at that time was the owner of the savings accounts mentioned in paragraphs 1 through 14, *supra,* and said accounts are now due and payable to the Administrator of his estate, together with interest thereon to date of payment."

From these pleadings it is clear that Plaintiff and Appellant is attempting to establish an agreement between the parties that there was no transfer of ownership in the respective joint accounts and that the parties understood and agreed that the accounts were opened for convenience of making withdrawals.

A contract is made up of several necessary elements, including competent parties, consideration, legal object, and meeting of minds. The only question with which we are here concerned is whether the parties had a meeting of their minds as to the agreement they were entering into. This is a question of fact to be determined from all the facts and circumstances. Meeting of the minds is not proven solely by written or spoken words but may be proven by "other acts or conduct." *Restatement of the Law of Contracts,* section 21.

Whether Plaintiff and Appellant is able to prove by clear and convincing evidence that the parties entered

into an agreement that the signing of the joint deposit cards was for convenience of making withdrawals can only be decided upon a hearing of all the evidence relating to the written or spoken words and evidence of the other acts or conduct of the parties. These questions can only be decided by a trial court where full opportunity to present the facts is given.

This Court has not said that Plaintiff and Appellant failed to plead a cause of action. Under ancient pleading forms it was required that specific words be used in order to state a cause of action, but such code pleadings have been abolished by Rule 8(e)(1) of the Utah Rules of Civil Procedure. The Complaint filed in this case fully apprises the parties of the claims made by the Plaintiff. By Motion for Summary Judgment, Defendant attempted to dismiss Plaintiff's Complaint and the trial court denied the Motion because the Complaint does state a cause of action. The correctness of that ruling is not now, nor has it been, before this Court.

Plaintiff and Appellant is attempting to establish a different contract than the contract of joint tenancy ostensibly created by the parties when they signed the joint tenancy deposit cards. There is nothing before this Court which indicates that Plaintiff and Appellant is not attempting to prove a different agreement of the parties.

CONCLUSION

Plaintiff and Appellant should be given its day in court and be permitted to present evidence to reform the joint tenancy contract and show some other agreement of the parties which is what Plaintiff and Appellant has attempted to do since filing the Complaint in this case. Plaintiff and Appellant has had no opportunity to proceed with its proof and has had no opportunity to present its evidence of "some other agreement of the parties" which this Court said a party may attempt to prove. See, *e.g.*, ***Beehive State Bank v. Rosquist, et al.,*** 439 P.2d 468, 471, ... Utah 2d ....., as cited in the opinion of the case now before the Court.

Respectfully submitted,

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